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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 849

CITY OF MILWAUKEE

Petitioner

vs.

CITY OF WEST ALLIS

Respondent

BRIEF OF RESPONDENT, CITY OF WEST ALLIS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Wisconsin Supreme Court held that the petitioner as a public utility had failed to establish a cause of action under the Wisconsin Statutes for the period from January 1, 1930 to April 4, 1935. It ordered judgment against the respondent for the period from April 4, 1935 to June 30, 1939, upon the basis of a stipulation between the parties.

The pertinent facts and issues considered by the Wisconsin Supreme Court.

Both the original (R. p. 1) and the supplemental (R. p. 9) complaint of the petitioner, as the Wisconsin Supreme Court expressly held (R. p. 451), allege merely a cause of action on implied contract to recover the reasonable value of water furnished in excess of the amount voluntarily paid

by the respondent. However, the Wisconsin Public Utility Act, more particularly Section 196.22 of the Wisconsin Statutes (see Appendix), prohibits a public utility from recovering for services rendered in Wisconsin except pursuant to a rate specified in a schedule filed with the Public Service Commission. Section 196.19 (1) of the Wisconsin Statutes (see Appendix) also provides that the first rates filed by a public utility operating prior to April 1, 1907, "shall not exceed the rates, tolls and charges in force April 1, 1907." Neither the complaint nor the supplemental complaint contained an allegation with respect to the filing of a schedule of rates with the Public Service Commission, and the complaint admitted (R. p. 6) payment by West Allis at the rate in force between the parties from April 1, 1907, to January 1, 1930, to-wit, six cents per hundred cubic feet of water furnished. Manifestly the complaint was demurrable.

The action proceeded to trial. Without referring to the Wisconsin Statutes, judgment was entered by the trial court for the amount by which the reasonable value of the water furnished was found to exceed the amount paid by the City of West Allis at the contract rate in effect during the period from April 1, 1907, to January 1, 1930. This judgment was challenged on appeal. The record failed to disclose that petitioner had filed a schedule of rates applicable to the respondent, and at page 21 of petitioner's brief in support of its petition for writ of certiorari, petitioner concedes that the files of the Public Service Commission of Wisconsin from January 1, 1930 to April 4, 1935,

> "* * * did not contain a schedule of rates specifically applicable to respondent, other than the rate applicable to water used outside the city limits for any purpose by non-contract users (Ex. 14A; R. 329)."

The petitioner argued before the Wisconsin Supreme Court (R. pp. 478-483), as it now asserts here, that it was excused from compliance with the statutory conditions precedent to recovery in quantum meruit (1) by the decision in

Milwaukee vs. West Allis, 217 Wis. 614, 258 N. W. 851, 259 N. W. 724, which trial counsel for West Allis stated (R. p. 482) he considered was res adjudicata as to petitioner's right to recover in this action, and (2) because an injunction obtained by West Allis and involved in said former litigation allegedly prevented the petitioner from shutting off the water service to the respondent and also from filing a schedule of rates with the Public Service Commission. Respondent challenged each of these contentions.

As stated by the Wisconsin Supreme Court in the instant case (R. p. 452), the contention of the parties on appeal was as follows:

> "The defendant claims that the circuit court erred in proceeding at all to determine the reasonable value of the water furnished; that Milwaukee being a public utility, the charge for rendering service can only be fixed under the provisions of the utility law. The plaintiff claims that the decision of this court in the former case required the circuit court to proceed as it did."

Manifestly the petitioner's grievance is that because of the interpretation by the Wisconsin Supreme Court, of its former decision and of the injunction, petitioner's excuses for non-compliance with the Wisconsin Statutes were rejected. Petitioner re-asserted the same contentions in its motion for rehearing filed in the Wisconsin Supreme Court (R. pp. 485-486), but said motion was denied.

The decision in the instant case was rendered in the light of the following former decisions:

In January, 1921, while the West Allis water contract was still in force, petitioner sought arbitrarily and unilaterally to increase the water rate. The Wisconsin Supreme Court held that the petitioner could not do this. *West Allis vs. Milwaukee*, 180 Wis. 512.

In June, 1926, the petitioner's claim of authority to increase the water rates without complying with the Wisconsin Public Utility Act was rejected. *Pabst Corp. vs. Milwaukee*, 190 Wis. 349.

On December 9, 1926, a schedule of rates was approved by the Public Service Commission, and petitioner thereupon asserted that these rates applied to West Allis in spite of the existing water contract. On August 22, 1929, the Railroad Commission of Wisconsin (now the Public Service Commission) held that said 1926 rates did not apply to the respondent, City of West Allis. The petitioner took an appeal, and its claim was again rejected in *Milwaukee vs. Railroad Commission*, 217 Wis. 606.

On December 2, 1929, just four weeks before the termination of the West Allis water contract, the common council of the petitioner passed a resolution requiring a deposit of money from the respondent prior to January 1, 1930, "otherwise no water will be furnished" thereafter. (See full resolution, R. p. 338). It was pursuant to this notification that West Allis obtained the injunction which the Wisconsin Supreme Court set aside solely on the ground that, being a public utility, petitioner could not under the Wisconsin Public Utility Act terminate such service in this wise. *Milwaukee vs. West Allis*, 217 Wis. 614, 258 N. W. 851, 259 N. W. 724.

A municipal corporation has no privileges or immunities entitling it to invoke the Fourteenth Amendment of the Federal Constitution as against the state creating it.

It is manifest that no substantial Federal question is involved in the determination of the Wisconsin Supreme Court that petitioner failed to establish a cause of action under the provisions of the Public Utility statutes of the state of Wisconsin.

Pages 7 and 8 of the Petition for Writ of Certiorari discloses that each of the reasons relied on for allowance of the writ is predicated upon alleged violation of the rights of the petitioner under the Fourteenth Amendment of the Constitution of the United States.

The City of Milwaukee being an arm and creature of the State of Wisconsin is not protected as against the state statute under the Fourteenth Amendment of the Constitution of the United States. This proposition has been expressly affirmed by this court on innumerable occasions. Thus in *Williams, Receiver of the Washington, Baltimore & Annapolis RR Co., vs. Mayor and City Council of Baltimore*, 289 U. S. 36, at page 40, the court said:

> "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator. *Trenton v. New Jersey*, 262 U. S. 182; *Newark v. New Jersey*, 262 U. S. 192; *Worcester v. Worcester Consolidated Street Ry. Co.*, 196 U. S. 539; *Pawhuska v. Pawhuska Oil Co.*, 250 U. S. 394; *Risty v. Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378, 390; *Railroad Commission v. Los Angeles Ry. Corp.*, 280 U. S. 145, 156."

This proposition was most recently reaffirmed by this court in *Coleman vs. Miller*, 307 U. S. 433, where this court said at page 441:

> "The principle that the applicant must show a legal interest in the controversy has been maintained. It has been applied repeatedly in cases where municipal corporations have challenged state legislation affecting their alleged right and obligations. Being but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator. *Pawhuska v. Pawhuska Oil Co.*, 250 U. S. 394; *Trenton v. New Jersey*, 262 U. S. 182; *Risty v. Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378; *Williams v. Mayor*, 289 U. S. 36."

We especially refer this court to its decision in *City of Trenton vs. New Jersey*, 262 U. S. 182. There the State of New Jersey had recovered judgment against the City of Trenton for $14,310, being license fees imposed by a state statute for taking water from the Delaware river. The City asserted that the statute violated the contract clause of the

Constitution of the United States and took its property held in a proprietary capacity, in violation of the Fourteenth Amendment of the United States Constitution. A privately owned water company, the predecessor in title of the City of Trenton, had originally by contract obtained the right to take water from the Delaware River without limitation and without license fee, and the City of Trenton maintained that it had acquired the benefit of said contractual right when it acquired said water works system. This contention was rejected, the court saying:

> "The power of the state, unrestrained by the contract clause of the Fourteenth Amendment, over the rights and property of cities held and used for 'government purposes,' cannot be questioned. In *Hunter v. Pittsburgh*, 179, (207 U. S. 161) reference is made to the distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private or proprietary capacity, and decisions of this court which mention that distinction are referred to. In none of these cases was any power, right, or property of a city or other political subdivision held to be protected by the contract clause or the Fourteenth Amendment. This court has never held that these subdivisions may invoke such restraints upon the power of the state." (Parenthetical matter inserted).

In a companion case, *Newark vs. New Jersey*, 262 U. S. 192, this court, citing cases, succinctly stated at page 196:

> "The City cannot invoke the protection of the Fourteenth Amendment against the State."

As disclosed in *Rose's Notes on U. S. Reports*, Vol. 10, 1932 Supplement, at page 157, this court has dismissed numerous cases for want of jurisdiction on the authority of *Trenton vs. New Jersey*, 262 U. S. 182, and its companion case, *Newark vs. New Jersey*, 262 U. S. 192.

In *Board of County Commissioners of Barber County vs. Peterson*, 266 U. S. 591, this court refused to review a decision of the Kansas Supreme Court reported in 113 Kan. 180, 213 Pac. 1054. The petitioning county had been denied

the benefit of a state guaranty fund for its county deposits. The state statute required that the interest rate on public moneys be (1) uniform throughout the county and (2) established by formal order of the Banking Commissioner as a condition precedent to participation in the state guaranty fund. The Commissioner of Banking knew of the rate of interest being paid on the county deposits by the insolvent bank and tacitly acquiesced therein. Review by this court was sought upon the ground that the decision of the Supreme Court of Kansas constituted a taking of the county's property without due process of law. However, this court dismissed the application for want of jurdisdiction.

Even if petitioner was an individual or private corporation, no basis exists for the issuance of a writ of certiorari.

We will take up seriatim and briefly point out the fallacies in each of the four specifications of error asserted by petitioner on page 17 of its brief in support of its petition for writ of certiorari.

1. Petitioner asserts the Wisconsin Supreme Court erred "in holding that the rates which were filed were not applicable to West Allis."

The decision of the Wisconsin Supreme Court so holding was filed April 2, 1935. *City of Milwaukee vs. City of West Allis,* 217 Wis. 614, 258 N. W. 851, 259 N. W. 724. In the instant case, Mr. Justice Fowler, after analyzing the earlier decision, stated (R. p. 455):

> "The holding of the former case that the orders of the Commission fixing rates for outside users did not apply to West Allis is res adjudicata."

We do not understand that this Court will review all alleged errors of the state courts or that this alleged error constitutes a basis for the issuance of a writ of certiorari. *Ballard vs. Hunter,* 204 U. S. 241, 258 (1907); *Worcester County Trust*

Co. vs. Riley, 302 U. S. 292 (1937), citing *Central Land Co. vs. Laidley*, 159 U. S. 103 (1895); *Tracy vs. Ginzberg*, 205 U. S. 170 (1907).

2. Petitioner asserts the Wisconsin Supreme Court erred "in failing to hold that because of the injunction and the stipulation as to issues, West Allis could not assert the claim that no specific schedule was on file as to it after January 1, 1930."

This issue was squarely presented to the Wisconsin Supreme Court both in the petitioner's brief prior to the original argument (R. pp. 478-483) and in its brief in support of motion for rehearing (R. pp. 485-486). It was considered by the Wisconsin Supreme Court and the contentions rejected.

Section 196.66 of the Wisconsin Statutes (see Appendix) provides for a forfeiture of not less than $25 nor more than $1,000 for violation of any provision of Chapter 196. The regulatory statutes of a state, particularly when penal in character, cannot be nullified by the doctrine of estoppel. 19 American Jurisprudence 804. In *Chicago & Alton RR. Co. vs. Kirby*, 225 U. S. 155, the railroad expressly undertook to expedite the shipment of horses from a point in Illinois to New York city without making a special charge for this additional service. In a suit for damages against the railroad company for delay, this court held at page 165:

> "An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be *published* in the tariffs, and for a breach of such a contract, relief will be denied, because its allowance *without such publication* is a violation of the act." (Italics supplied).

See also *Southern Ry. Co. vs. Lewis & Adcock Co.*, 139 Tenn. 37, 201 S. W. 131.

So in the instant case, the Wisconsin Supreme Court refused to excuse the petitioner's failure to comply with the requirements of the Wisconsin Public Utility Act, which compliance was a condition precedent to recovery in this action.

The statement by trial counsel for West Allis that the former decision of the Wisconsin Supreme Court was res adjudicata with respect to the petitioner's right of recovery, on its face was nothing more than his conclusion as to the effect of said decision. However, the Wisconsin Supreme Court expressly ruled that (R. p. 453).

> "We are of opinion that the question of recovery of reasonable value was not within the issues of the former case, and the statement of our opinion that Milwaukee could recover on quantum meruit is not res judicata, and therefore not binding upon the parties or the circuit court."

As a matter of fact, the statement of the Wisconsin Supreme Court in its former decision was as follows:

> "If the city in a proper action can establish that the service rendered by it upon the basis of *quantum meruit* was worth more than the amount which it has received, it will be entitled to recover accordingly *unless precluded on other grounds.* Whether or not it is entitled to recover and the amount of recovery are judicial quistions." *City of Milwaukee vs. City of West Allis,* 217 Wis. 614, at page 619. (Italics supplied).

So far as concerns petitioner's second specification of error, there appears no basis for the issuance of a writ of certiorari.

3. Petitioner asserts the Wisconsin Supreme Court erred "in deciding the case upon an issue or theory not presented below and upon which petitioner had no opportunity to be heard because of the stipulation and because not presented below."

All the issues were fully presented by petitioner to the Wisconsin Supreme Court both before the original argument (R. pp. 478-483) and on rehearing (R. pp. 485-486). All the issues were propositions of law, namely, (1) did the former decision of the Wisconsin Supreme Court hold that the water rates for non-contract users was not applicable to the respondent, City of West Allis, (2) was the statement of respondent's trial counsel that he considered said ruling was res judicata so far as petitioner's recovery in this action was concerned, a

binding stipulation, and (3) did the injunction obtained by West Allis by its terms prevent the petitioner from filing a schedule of rates in accordance with the Wisconsin Public Utility Act, and, if so, did this excuse the petitioner for non-compliance with that act. Manifestly the only issue of fact in petitioner's claim (Petition, page 8, para. 5), namely, that it "did not have an opportunity to prove that no specific schedule was filed as to respondent *because of the injunctions obtained by respondent*" (Italics supplied), relates to the construction of the injunctional order.

The former decision of the Wisconsin Supreme Court did not need to be offered in evidence. The injunction was offered and received in evidence and was a matter as to which the Wisconsin Supreme Court could take judicial notice, it having been the subject matter of a former decision in that court. The so-called stipulation or statement of counsel as to the effect of the former decision of the Wisconsin Supreme Court was a matter of record and manifestly a conclusion of law.

We fail to perceive on what basis this court should issue its write of certiorari even though the Wisconsin Supreme Court *erred in its construction* of (1) its former decision, (2) the injunction or (3) the so-called stipulation.

4. Petitioner asserts the Wisconsin Supreme Court erred "in holding that the petitioner was not entitled to recover upon the basis of the reasonable value of the services rendered as found by the trial court."

The Wisconsin Public Utility Act, more particularly Section 196.22, expressly provides that it is unlawful for any public utility "to demand, collect or receive any rate, toll or charge not specified in such schedule." Many years ago the Wisconsin Supreme Court construed this statute in the case of *Kilbourn City vs. Southern Wis. Power Co.*, 149 Wis. 168, 135 N. W. 499, and held at page 185:

> "We think the legislature has in effect said to public utilities, you must file your schedule of rates, you must charge what the schedule provides, and you may not charge anything unless you comply with the law."

Ignorance of this decision, much less of the statute, is no excuse for petitioner's failure to comply with the statute.

However, Wisconsin is not alone in enforcing this regulatory provision. In the case of *Kennebunk, K. & W. Water Dist. vs. Inhabitants of Wells,* 128 Me. 256, 147 Atl. 188, a quasi municipal corporation which, under the statutes of Maine, constituted a public utility, took over the property of a water company. The water district continued to bill and charge the various municipal customers in the district at the old rate. In a suit to recover the same, the Supreme Judicial Court of Maine said at page 190:

> "The rates of the water company, if adopted by the trustees, were no longer those of the water company, but became on adoption those established by the district, and according to the plain intent of chapter 55, Rev. St., must be filed with the Utilities Commission, in order that they may be of public record, and be complained against by any person aggrieved thereby. *Until this is done, the courts will not enforce the recovery of them in a suit at law.* A utility has no right to furnish service to the public until it has complied with the provisions of chapter 55. Failure to do so subjects it to a penalty." (Italics supplied).

Conclusion

In view of the foregoing, the petition for writ of certiorari to the Supreme Court of the State of Wisconsin in the above entitled matter should be denied.

Respectfully submitted,

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